

DBIA

DESIGN-BUILD
INSTITUTE OF
AMERICA

March 19, 2001

Attn: PL 106-107 Comments
Department of Health and Human Services
200 Independence Avenue, SW
Room 517-D
Washington, DC 20201

Re: Request for Comment; Interim/Draft Plan of Action to Implement Public Law 106107, the Federal Financial Assistance Improvement Act of 1999

Dear Sir/Madam:

The Design-Build Institute of America (DBIA) provides a voice for design-build practitioners, advocates best practices, creates and disseminates educational information, furnishes advice and support to facility owners and users. Founded in 1993, DBIA promotes the widespread and successful use of the design-build method of project delivery throughout industry and government. With its headquarters in Washington, DC, DBIA currently counts over 830 design-build practitioners on its membership roles. As compiled by ENR magazine, DBIA members account for over \$70 billion in construction put in place in 2000.

DBIA appreciates this opportunity to present comments on the Interim/Draft Plan of Action and commends the agencies listed in the Notice for their joint effort to develop a plan to streamline and simplify the application, administration and reporting procedures for the federal grant programs of the involved agencies (the Common Rule). Given that over \$300 billion of federal assistance is provided to state and local grantees each year from more than 25 federal agencies, the members of DBIA support efforts to improve the efficiency of that process. Any burdensome, restrictive or conflicting provisions in a federal agency's grant program, which impedes the cost-effective utilization of financial assistance by grantees, should be removed.

Design-build is a single contracting approach to the design and construction

process as contrasted with the traditional design-bid-build method, which uses separate contracts for the design and construction phases of the project. The use of design-build has grown from 5 percent of the construction in 1985 to 33 percent of all U.S. construction in 1999

and is projected to surpass the traditional design-bid-build method of project delivery in the next 5 to 10 years.

Independent research on project performance has shown design-build, when compared to traditional design and low-bid contracting, to be 33 percent faster, 6 percent less in cost, superior in product quality and producing less than half the claims and litigation. The research was conducted at Penn State University and was sponsored by the internationally renowned Construction Industry Institute (CII) at the University of Texas at Austin. These results do not include the advantage gained by earlier occupancy of the facility, which often overshadows the project level savings cited above.

Design-build is normally procured through a 'best value' procurement approach. Traditionally, architects and engineers are selected based on qualifications only and contractors on the basis of price alone. Design-build integrates those approaches into a combination of qualifications and price based selection, which is referred to as 'best value'. Good statutory language maintains the qualifications-based principles for the design and construction professionals within the design-build team while still providing systems to ensure effective cost competition for the direct costs of construction.

Starting as a private sector approach to capital project acquisition, design-build is now a recognized project delivery strategy in 43 states and in federal procurement. Design-build is the method of choice for privatized options to public infrastructure projects. Because of its speed and cost effectiveness, design-build is being used on an expanded basis by government agencies of all levels.

DBIA believes that the federal grant program requirements for procurement methods and procedures need to be revised to reflect the full spectrum of procurement methods now available to state and local governments. Competitive proposals and negotiated source selection must be on equal footing with sealed bid as an acceptable procurement approach. This is not the case, however, in some federal agency grant programs. For instance, Sec. 31.36 (b) Procurement Standards, of EPA's UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS (the Common Rule), states that "Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section". However, subsection (d) (2) under Methods of Procurement goes on to state that **"The sealed bid method is the preferred method for procuring construction, if the conditions in 31.36(d)(2)(i) apply"**. While this provision does not prohibit the procurement of design-build services by competitive sealed proposals, such a preference by the federal agency toward sealed bid will significantly inhibit the grantee's willingness to avail itself of the many benefits available through

innovative design and construction project delivery methods that are routinely available to it. Such a preference will have a chilling effect on a state or local government's discretion to follow its own procurement standards and procedures.

Such language, which specifically dictates a preference for sealed bid procurement, is not compatible with a number of existing state and federal procurement laws as well as the ABA's Model Procurement Code for State and Local Governments. The Competition in Contracting Act of 1984 put competitive proposals and negotiated source selection on equal footing with sealed bidding in the federal marketplace. As a result, more dollars are spent on federal projects through competitive proposals than through sealed bids and these procedures are considered "full and open competition" by the federal government. Section 4105 of the Federal Acquisition Reform Act (FARA) of 1996 specifically authorizes the design-build method or project delivery and establishes a two-phase selection procedure, not sealed bid. No procurement standard that is more restrictive than the prevailing federal standard should be imposed upon states by federal agencies through the grant process.

Section 5-201 of the American Bar Association's 2000 Model Code for State and Local Governments specifically authorizes the use of design-build and other innovative project delivery methodologies. Section 5-202 of the Model Code proceeds to specify the source selection method applicable to each such project delivery methodology. For design-build and its derivative project delivery methodologies, the prescribed procurement method is competitive sealed proposals, not sealed bid.

DBIA recommends placing competitive sealed proposals, and its logical extension, negotiated source selection, on equal footing with competitive sealed bid (as is authorized under federal statute for direct federally funded projects).

With the increased acceptance and success of design-build and other innovative project delivery methods, the legislative trend is away from the antiquated, prescriptive bias toward sealed bid. The trend is in favor of increased authority on the part of procurement officials to employ procurement methods other than sealed bid in order to be able to utilize innovative, cost-effective alternative project delivery methodologies. The test for determining which project delivery method to use and what procurement procedures are required should be what is in the "best interest" of the grantee, given the peculiarities of the project. This "best interest" test should be applied on a case-by-case basis. State and local procurement officials should not be inhibited from applying such a test on a federally funded project because of any preference language in the federal agency's administrative requirements. Such language is not beneficial, is not in the best interest of the state or local entity, and does not provide for the most effective use of the funds. Such language should, therefore, be deleted. While design-build is not for all applications, it and other innovative project delivery approaches should be available to all state and local agencies. For this to occur, such agencies must have all types of procurement methodologies available to them on an equal footing with competitive sealed bid.

DBIA thanks you for the opportunity to submit these comments for your

consideration and would be delighted to meet with you at your convenience to discuss the limitations and benefits of different procurement methodologies and their effect on alternative project delivery methods.